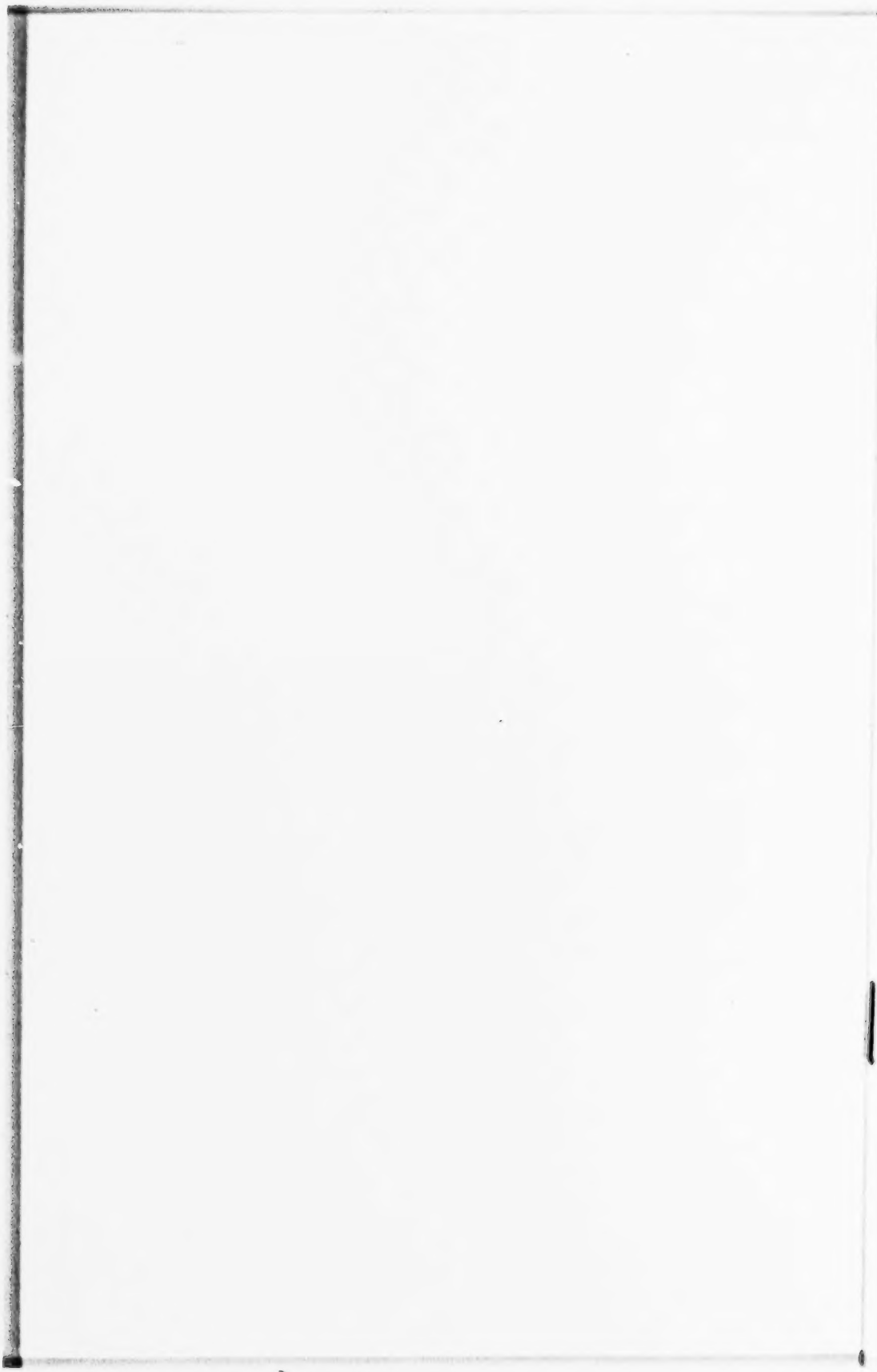

LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
APR 17 1969
JOHN F. DAVIS, CLERK

Supreme Court of the United States.

OCTOBER TERM, 1968.

No. 996.

ARTHUR F. BURHOE,
Petitioner,
v.
HON. ANTHONY JULIAN, as he is Judge of the United States District Court for the District of Massachusetts, and GARRETT BYRNE, as he is District Attorney for the Suffolk District,
Respondents.

PETITIONER'S REPLY BRIEF.

Statement.

This brief is written in reply (Rule 24.4) to briefs in opposition to a petition for writ of certiorari and motion to file petition for writ of mandamus. The briefs in opposition have been filed by the Solicitor General of the United States on behalf of the respondent Judge Julian and by an Assistant Attorney General of Massachusetts on behalf of the respondent Garrett Byrne.

Argument.

I. There was Nothing "Preliminary" about the Proceedings in which Petitioner Alleges Jeopardy to have Attached.

In his brief the respondent Byrne argues (Brief, 2-4) at length that the proceedings in the Charlestown Municipal Court were only in the nature of a probable cause hearing and that, therefore, no jeopardy attached when they were dismissed after witnesses were sworn and heard. This argument is based upon a gross misstatement of the facts alleged in the petition and stated by Judge Julian. We quote from his opinion (Appendix, 18):

> "Plaintiff further alleges here . . . that after one continuance *trial in Municipal Court was scheduled for April 9, 1968,* on which date *plaintiff appeared with counsel ready for trial; that the complaints were called for trial on that date;* that plaintiff through counsel presented a motion to suppress evidence which the court heard and denied; *that the court proceeded to swear witnesses and to hear evidence against plaintiff;* and that, after four witnesses had testified, the Municipal Court judge declared over objection that he would hear no further evidence but would instead bind plaintiff over to the Superior Court, meaning and intending to mean that he found probable cause for the plaintiff to be indicted by a grand jury and that plaintiff could be so indicted. Plaintiff also alleged . . . that *the Municipal Court had jurisdiction to try the complaints* and that the evidence presented was sufficient to show that *the crimes charged were committed within the Municipal Court's territorial jurisdiction.*" (Emphasis supplied.)

II. The Court of Appeals did Not Lose Jurisdiction to Issue a Writ of Mandamus because it Was Filed More than Thirty Days After the District Court Dismissed Petitioner's Complaint.

For the first time in this case, it is suggested in the brief of the Solicitor General that the petition for writ of mandamus in the Court of Appeals was dismissed because it was not timely (Brief, 4). The brief of the Solicitor General does not rule out mandamus in the Court of Appeals to compel the convening of a three-judge court but suggests that such a petition must be brought within the thirty-day appeal period prescribed by Rule 4(a) of the Federal Rules of Appellate Procedure (Brief, 2, 3, 4).[1]

It should be a sufficient answer to this argument that the doctrine of laches, not a statute of limitation, governs the bringing of federal mandamus proceedings. *Chapman* v. *County of Douglas*, 107 U.S. 348, 355. *United States ex. rel. Arant* v. *Lane*, 249 U.S. 367, 372. As this Court noted in *Holmberg* v. *Armbrecht*, 327 U.S. 392, 396, quoting *Gallihier* v. *Cadwell*, 145 U.S. 368, 373, "laches is not like limitation, a mere matter of time; but principally a question of the inequity of permitting the claim to be enforced—an inequity founded upon some change in the condition or rela-

---

[1]The Solicitor General then seems to argue circularly that "[m]andamus will lie only where there is not an adequate remedy by appeal." Ergo, if plaintiff had brought mandamus proceedings within the thirty-day period, the Solicitor General would then argue that appeal was the appropriate remedy, whereas since there was no remedy by appeal when the mandamus proceeding was brought, the Solicitor General contends that there was no remedy by mandamus either. See pp. 7-8 of petition. It should also be noted that the thirty-day appeal period suggested in Rule 4(a) is not jurisdictional, since the rule clearly provides that "the district court may extend the time for filing the notice of appeal by any party for a period not to exceed 30 days. . . ."

tions of the property or the parties." It is hardly necessary to labor the point that the forty-eight day lapse between Judge Julian's dismissal and the filing of the petition in the Court of Appeals worked no inequity founded upon some change in conditions to any of the parties.

In *Ex parte Metropolitan Water Co. of West Virginia*, 220 U.S. 539, it would appear that this Court issued a writ of mandamus to compel the convening of a three-judge panel, though the petition was filed after the time for appeal (at that time, thirty days) had passed. In the case at bar, if petitioner had filed a notice of appeal thirty days after Judge Julian's judgment, the mechanics of the appeal (*e.g.*, printing) probably would have delayed its entry in the Court of Appeals to a later date than October 24, 1968, on which the petition for a writ of mandamus was filed.

The most significant argument, however, that can be made in response to the Solicitor General's contention is that the rule which he proposes is purposeless. If petitioner is correct in believing that his complaint should have been heard by a three-judge court, it is elementary that a single judge lacked jurisdiction to dismiss that complaint. *Stratton* v. *St. Louis Southwestern Railway Co.*, 282 U.S. 10, 15. The purpose of mandamus in the Court of Appeals, therefore, is to obtain guidance as to the District Court's jurisdiction. *Idlewild Bon Voyage Liquor Corp.* v. *Epstein*, 370 U.S. 713, 716. *Reed Enterprises* v. *Corcoran*, 354 F. 2d 519, 523-524. If such guidance becomes unavailable because more than thirty days have passed, the lack of jurisdiction to dismiss the complaint in the District Court is not cured and *res judicata* does not attach to such dismissal. *Williamson* v. *Berry*, 8 How. 495, 542. New proceedings could be commenced, and the parties could traverse several more miles of litigation merely to determine whether the

complaint should have been heard by a three-judge court.[2] This result should be avoided, and that question should now be answered.

Respectfully submitted,

DAVID BERMAN,

Attorney for the Petitioner.

---

[2]Even if the Solicitor General were correct in arguing that the Court of Appeals lacked jurisdiction over the petition for writ of mandamus, it would not follow that "review of the district court's action is not available by seeking a writ of mandamus in this Court" (Brief, 4). If he were, it would mean that over half a century of precedent (see cases cited in *Stratton* v. *St. Louis Southwestern Railway Co.*, *supra*) was overruled *sub silentio* in *Idlewild Bon Voyage Liquor Corp.* v. *Epstein*, *supra*.